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United States v. Shell Oil: When Control Is Not Controlling - The Question of Federal Arranger Liability under CERCLA

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*UNITED STATES V. SHELL OIL: WHEN CONTROL IS NOT
CONTROLLING - THE QUESTION OF FEDERAL ARRANGER
LIABILITY UNDER CERCLA*

I. INTRODUCTION

Throughout our Nation's history, the federal government has relied upon the endeavors of private manufacturers to supply the military with the materials required for national defense.¹ Even before 1776, American military provisions were the result of cooperative efforts between the government and independent contractors.² While today it seems logical, and in some cases imperative, to consider the environmental effects of these contracts, it was not until the 1970s that attention was focused on this issue.³ Where modern defense contracts specifically stipulate that environmental cleanup costs will be passed to the taxpayer and procurement policies require consideration of environmental impacts, the contracts of old typically failed to contemplate the problem.⁴

In 1980, Congress addressed the shortcomings of these contracts and passed the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).⁵ Under CERCLA, par-

1. See ERNA RISCH, SUPPLYING WASHINGTON'S ARMY Ch. 1 (1981), *available at* <http://www.army.mil/cmh-pg/books/RevWar/risch/chpt-1.htm> (last visited Mar. 30, 2003) (explaining process of supplying Continental Army during American Revolution). See generally Letter from Henry Knox to George Washington (Feb. 13, 1781) *available at* Rediscovering George Washington, http://www.pbs.org/georgewashington/collection/war_1781feb13.html (last visited Mar. 30, 2003) (responding to General Washington's request for military provisions).

2. See generally Richard Schack, *The Revolutionary Spirit*, THE QUEENS TRIBUNE, *available at* <http://www.queenstribune.com/archives/anniversaryarchive/anniversary2000/revolution.htm> (last visited Apr. 15, 2003) (describing wealth accumulation by residents of Queens, New York as result of revolutionary war supply contracts).

3. See Major Kenneth Michael Theurer, *Sharing the Burden: Allocating the Risk of CERCLA Cleanup Costs*, 50 A.F. L. REV. 65, 65 (2001) (explaining that government contracts seldom included provisions for environmental remediation before legislators passed environmental statutes during 1970s).

4. See *id.* (stating that today's defense contracts include cost of environmental cleanup in contract price).

5. See Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601-75 (1994) [hereinafter CERCLA] (providing legislative process for hazardous waste cleanup and recovery of cleanup expenses); see also Lieutenant Colonel Cheryl Lynch Nilsson, *Defense Contractor Recovery of Cleanup Costs at Contractor Owned and Operated Facilities*, 38 A.F. L. REV. 1, 3 (1994) (describing CERCLA as "most comprehensive federal statute" to deal with prior hazardous waste contamination).

ties may be held responsible for the cleanup costs of environmental pollution, even if the damage occurred prior to the adoption of CERCLA.⁶ CERCLA provides liability for private parties, as well as for the United States, should they fall into one of four limited classifications.⁷

Recently, in *United States v. Shell Oil*,⁸ the Ninth Circuit Court of Appeals considered the application of CERCLA to cleanup costs resulting from a World War II era defense contract.⁹ Although the Ninth Circuit refused to find the United States liable, the court affirmed past precedent that the United States intended, at least to a limited degree, to waive sovereign immunity under CERCLA.¹⁰ The court provided further guidance on how to interpret this limited waiver and in what circumstances it could apply.¹¹

6. See *United States v. Shell Oil*, 841 F. Supp. 962, 974 (C.D. Cal. 1993) (stating that CERCLA language, legislative history and judicial interpretation all support retroactive application; retroactive application of CERCLA does not offend constitutional due process). See also *United States v. Ward*, 618 F. Supp. 884, 898 (E.D. N.C. 1985) (explaining "[t]hat Congress intended CERCLA to apply to acts committed before enactment of the statute is clear from the wording of the statute 42 U.S.C. § 9607(a)(1982), has been consistently agreed upon by courts which have addressed the issue.").

7. See Nilsson, *supra* note 5, at 3 (describing congressional intent for CERCLA to apply to private parties and United States similarly).

8. 294 F.3d 1045 (9th Cir. 2002), *cert. denied*, 123 S.Ct. 850 (Jan. 13, 2003) [hereinafter *Shell Oil*].

9. For a discussion of *Shell Oil* facts, see *infra* notes 16-33 and accompanying text.

10. For a discussion of federal sovereign immunity waiver under CERCLA, see *infra* notes 58-69 and accompanying text; see also *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 10 (1989) (stating in dicta that CERCLA contained waiver of federal immunity); *FMC Corp. v. United States Dep't of Commerce*, 29 F.3d 833, 840 (3rd Cir. 1994) (interpreting that CERCLA § 120(a)(1) holds United States "liable in the same manner and to the same extent as any non-governmental entity."); *East Bay Mun. Util. Dist. v. United States Dep't of Commerce*, 142 F.3d 479, 481 (D.C. Cir. 1998) (holding "that the waiver of immunity contained in § 9620(a)(1) is co-extensive with the scope of the substantive liability standards of CERCLA."). See generally *United States v. Skipper*, 781 F. Supp. 1106, 1111 (E.D. N.C. 1991) (stating "[t]here is no question that Congress expected government agencies to shoulder their proportionate share of CERCLA response costs when they have acted as owners, operators, generators or transporters."); *In Re Paoli R.R. Yard PCB Litig.*, 790 F. Supp. 94, 96 (E.D. Pa. 1992) (finding waiver of sovereign immunity under CERCLA section 120(a) to be "limited only to circumstances under which a private party could also be held liable.").

11. See *Shell Oil*, 294 F.3d at 1053 (stating that "CERCLA's waiver of sovereign immunity is coextensive with the scope of liability imposed by 42 U.S.C. § 9607."). Under CERCLA § 107 (codified in 42 U.S.C. § 9607), liability falls upon the following: those who own or operate a facility; those who owned or operated a facility at the time a hazardous substance was disposed; those who arrange for disposal or treatment or transportation for purposes of disposal or treatment; those who accept a hazardous substance for transport. See 42 U.S.C. § 9607(a)(1-4).

This Note examines the federal waiver of sovereign immunity pursuant to CERCLA as well as the circumstances in which the government may be held liable, focusing specifically on federal liability as an “arranger.” Part II discusses the facts of *Shell Oil* and Part III reviews the background leading up to the *Shell Oil* decision.¹² Part IV analyzes the Ninth Circuit’s rationale in failing to assign liability to the United States.¹³ Part V provides a critical evaluation of the court’s rationale relative to Congressional intent and the prior holdings of other circuits.¹⁴ Finally, Part VI suggests the likely impact of *Shell Oil* on future CERCLA litigation.¹⁵

II. FACTS

In 1942, Shell Oil Company, Union Oil Company, Atlantic Richfield Company and Texaco, Inc. (Oil Companies), all of which operated refineries near Los Angeles, contracted with Eli McColl to transport acid waste from their refineries and dump it on land in Fullerton, California, now known as the McColl Superfund Site (McColl Site).¹⁶ The waste at issue resulted from the production of aviation fuel pursuant to World War II contracts between the Oil Companies and the United States military.¹⁷ These contracts, silent as to who would bear the burden of waste treatment, required the Oil Companies to drastically increase the quantity of aviation fuel production to meet wartime demand levels.¹⁸

12. For a discussion of *Shell Oil* facts, see *infra* notes 16-33 and accompanying text. For a discussion of the occurrences leading up to the *Shell Oil* decision, see *infra* notes 34-91 and accompanying text.

13. For a narrative analysis of the *Shell Oil* decision, see *infra* notes 92-111 and accompanying text.

14. For a critical analysis of the *Shell Oil* decision, see *infra* notes 112-49 and accompanying text.

15. For a discussion of the likely impact of the *Shell Oil* decision, see *infra* notes 150-60 and accompanying text.

16. See *Shell Oil*, 294 F.3d at 1051 (describing history of McColl disposal contracts). In addition to the alkylation acid and acid sludge waste generated from avgas production, McColl also accepted acid sludge from benzol production. See *United States v. Shell Oil Co.*, 13 F. Supp. 2d 1018, 1023 (C.D. Cal. 1998) [hereinafter *Shell III*]. This waste was a byproduct of a contract, separate from the avgas contracts, in which Shell Oil manufactured benzol for the Government. See *id.* The Government did not originally dispute its liability for the cleanup of the benzol waste, which constituted between five and six percent of the waste at the McColl Site. See *id.*

17. See *Shell Oil*, 294 F.3d at 1048 (explaining that Oil Companies in Los Angeles area dumped waste from aviation fuel production at McColl site). For a discussion of World War II aviation fuel production, see *infra* notes 34-47 and accompanying text.

18. See *Shell Oil*, 294 F.3d at 1050 (describing how government agencies relied almost exclusively on contractual agreements to ensure avgas production).

As a result of the amplified production, hazardous waste levels increased.¹⁹ Starting in June 1942 and continuing until September 1946, 100,000 cubic yards of waste was dumped in unlined sumps at the McColl Site.²⁰ The government was aware that the manufacture of aviation fuel produced hazardous waste and attempted to alleviate the problem of waste accumulation at the refineries by assisting with the lease of a storage facility in Southern California.²¹ The government, however, never overtly mandated or approved the dumping of waste and was never proven to be aware of the dumping at the McColl site.²² During the 1950s, McColl and the Oil Companies filled and sealed these sumps to allow for residential development of the surrounding area.²³ The government incurred nearly one hundred million dollars in costs when the waste was finally removed during the 1990s.²⁴

The United States, along with the State of California, brought suit against the Oil Companies under CERCLA to recover the cost of cleaning up the McColl site.²⁵ The Oil Companies counter-claimed, arguing that under CERCLA the United States was liable.²⁶ In a series of written opinions, the District Court of the

19. *See id.* (stating that “[d]uring the war, acid sludge was generated in much greater quantities than ever before . . .”).

20. *See id.* at 1051 (describing duration of dumping). A sump is “a pit or tank that catches liquid runoff for drainage or disposal,” similar to a cesstank. U.S. Environmental Protection Agency, *Terms of the Environment*, at <http://www.epa.gov/ocepaterns/terms.html> (last visited Mar. 30, 2003); *see also* Santa Barbara County Air Pollution Control District, *Policies and Procedures*, at http://www.sb-capcd.org/eng/dl/eng_p&p/6100-060.pdf (last visited Mar. 30, 2003) (defining sump as “excavated depression in the ground that is in more or less continuous use for separating oil, water, and sand in oil and gas production operations.”).

21. *See Shell Oil*, 294 F.3d at 1051 (recounting government involvement in disposal of avgas waste).

22. *See id.* (explaining role of United States in waste disposal).

23. *See id.* (describing subsequent history of McColl site). Portions of the McColl site were developed into the Los Coyotes Country Club and Golf Course. *See Shell I*, 841 F. Supp. 962, 969 (C.D. Cal. 1993) (providing subsequent history). Residences were also constructed nearby. *See id.* During the decade between the construction of the course and the waste cleanup, reports were made of “black, viscous, tar-like” acid sludge seeping up to the surface. *See id.*

24. *See Shell Oil*, 294 F.3d at 1051 (stating amount of damages).

25. *See Shell I*, 841 F. Supp. at 965 (giving procedural history). The government also sought recovery of costs from McAuley LCX Corporation which was the subsequent owner of the McColl site. *See id.* at 966. Recovery of response costs are allowed pursuant to CERCLA § 107(a). *See* 42 U.S.C. § 9607(a).

26. *See Shell I*, 841 F. Supp. at 975 (describing Oil Company claim for contribution from United States). Defendants are permitted to bring actions for contribution pursuant to CERCLA § 113(f). *See* 42 U.S.C. § 9613(f). In this case, defendants asserted that the U.S. was liable “due to the alleged control the United States exercised over the petroleum industry during World War II.” *Shell I*, 841 F. Supp. at 975.

Central District of California held that the United States had waived sovereign immunity to suit under 42 U.S.C. section 9620(a)(1).²⁷ The court also dismissed the Oil Companies' arguments that they should be exempt from liability under either the "act of war" provision of CERCLA section 107(b)(2) or the "act of third party" defense in CERCLA section 107(b)(3).²⁸ The district court rejected the Oil Companies' argument that retroactive application of CERCLA was unconstitutional.²⁹ The court further found both the United States and the Oil Companies liable as "arrangers" for the nonbenzol waste cleanup.³⁰ The court, however, allocated 100 percent of the cleanup costs for the waste, to the United States.³¹ Both the United States and the Oil Companies appealed the district

27. See *United States v. Shell Oil Co.*, 1995 U.S. Dist. LEXIS 19778, at *17-18 (C.D. Cal. Sept. 18, 1995) [hereinafter *Shell II*] (holding that "Congress expressly and unequivocally waived the immunity of the United States when it enacted CERCLA.").

28. See *Shell I*, 841 F. Supp. at 970-72 (declining to accept refiners' act of war argument as legitimate defense). Under CERCLA § 107(b)(2), defendants will be exempted from liability if they "can establish by a preponderance of the evidence that the release was 'caused solely by . . . an act of war.'" *Id.* at 970 (quoting 42 U.S.C. § 9607(b)(2)). Although the district court was unable to come to a definitive conclusion as to how "act of war" should be interpreted, the court determined that the phrase "cannot reasonably be construed to cover either the government's wartime contracts to purchase aviation fuel from the oil companies or its regulation of the oil companies' production of aviation fuel." *Id.* at 972. Pursuant to CERCLA § 107(b)(3), defendants will not be held liable where a totally unrelated third party is the sole cause of the release. See 42 U.S.C. § 9607(b)(3). The court held that section 107(b)(3) of CERCLA does not apply to situations in which the defendant was in a contractual relationship with the third party and that this defense must necessarily fail because of the relationship between the Oil Companies and the government. See *Shell I*, 841 F. Supp. at 972-73 (overruling defendant act of third party argument).

29. See *Shell I*, 841 F. Supp. at 974 (explaining that CERCLA language, legislative history and prior judicial interpretation all support finding that statute is to be applied retroactively). The Oil Companies made an additional constitutional claim, arguing that CERCLA section 107(a) liability was the equivalent of an unconstitutional taking. See *id.* The court dismissed this claim by showing that CERCLA's provision for contribution negated any possible interpretation of section 107 as a taking. See *id.*

30. See *id.* at 1026-29 (finding that both Oil Companies and United States government qualified as arrangers).

31. See *Shell III*, 13 F. Supp. 2d 1018, 1026-29 (C.D. Cal. 1998) (assigning total cost of waste cleanup to United States). Applying factors of equity, the district court came up with three reasons for allocating the total cost to the United States:

(1) such a result simply places a cost of the war on the United States and thus on society as a whole, (2) the Oil Companies were unable to transport avgas waste to Richmond for recycling due to the unavailability of tank cars, and (3) the Oil Companies were unable to construct treatment plants due to the WPB's refusal to issue priorities.

Id. at 1027.

court ruling.³² On review, the Ninth Circuit Court of Appeals upheld the finding of arranger liability in respect to the Oil Companies, but reversed the finding of arranger liability against the government.³³

III. BACKGROUND

A. World War II Avgas Production

During World War II, the United States military required vast quantities of a high-octane gasoline used for aviation.³⁴ Known as “avgas,” this newly developed fuel was formulated through a combination of standard gasoline and various chemical additives.³⁵ Alkylate was a primary additive.³⁶ Referred to as “alkylation,” the production of alkylate requires the use of highly pure forms of sulfuric acid; through the alkylation process, sulfuric acid becomes degraded.³⁷ This tainted “alkylation acid” could either be recycled and used again for alkylation, used in other production processes that did not require such a pure form, or disposed of without reuse.³⁸

As World War II progressed, the government recognized the importance of avgas to the war effort and took steps to increase

32. *See Shell Oil*, 294 F.3d 1045, 1048 (9th Cir. 2002) (stating appellate arguments). The United States argued that the district court was mistaken in holding that section 120(a)(1) of CERCLA waives sovereign immunity, that the United States was liable as an “arranger,” and that 100% of the cleanup costs should be allocated to the United States. *See id.* The Oil Companies argued that the district court erred in dismissing their request for immunity under the “act of war” provision of § 9607(b)(2). *See id.* at 1061-62.

33. *See id.* (upholding district court rulings that CERCLA waives sovereign immunity and that act of war defense was not appropriate; reversing district court rulings that United States was liable as arranger).

34. *See Shell II*, 1995 U.S. Dist. LEXIS 19778, at *5 (C.D. Cal. Sept. 18, 1995) (describing use of avgas). High octane gasoline was of particular importance to the war effort, for it “allowed allied fighters to attain higher speeds, higher ceilings, faster rates of climb and the ability to carry a heavier load than our enemies could achieve.” *Id.*

35. *See Shell Oil*, 294 F.3d at 1049 (describing makeup of avgas).

36. *See id.* (describing avgas composition). Alkylate is a liquid product with a high octane number which is used to improve the antiknock properties of gasoline. *See Encyclopedia of Petroleum Products*, available at http://www.prod.exxon.com/exxon_productdata/lube_encyclopedia/alkylation.html (last visited Apr. 14, 2003).

37. *See Shell Oil*, 294 F.3d at 1049 (explaining use of sulfuric acid in avgas production). “Approximately 90% of the sulfuric acid used by the refineries during [World War II] was devoted to [alkylation].” *Id.* Alkylation “continues to withstand the test of time” and is still used today. *See Phillips Petroleum Company, Fuels Technology – Alkylation*, at <http://www.fuelstechnology.com/alky.htm> (last visited Mar. 30, 2003).

38. *See Shell Oil*, 294 F.3d at 1049 (describing uses of spent alkylation acid).

control over its production.³⁹ The government established the War Production Board (WPB) and the Petroleum Administration for War (PAW) to monitor and ensure the manufacture of avgas.⁴⁰ Although these agencies had the power to usurp avgas production, they instead chose long-term contractual agreements with the petroleum refiners.⁴¹ The federal government offered these refiners low interest loans to cover the costs of new avgas production facilities as well as any other unexpected expenses that might result.⁴² While the refiners privately owned these facilities, the government exercised considerable oversight into the production process.⁴³ Under the Planned Blending Program, the government mandated

39. *See id.* (describing government's need for high octane fuel). "During [World War II], production of avgas increased more than twelve-fold, from roughly 40,000 barrels per day in December 1941 to 514,000 barrels per day in 1945." *Id.*

40. *See id.* at 1049-50 (describing government role in petroleum administration). The War Production Board [hereinafter WPB], created in January 1942 pursuant to a President Roosevelt executive order, was "empowered to issue directives to industry in connection with war procurement and production, including directives with respect to purchasing, contracting, specification, construction, requisitioning, plant expansion, conversion and financing." *Shell III*, 13 F. Supp. 2d 1018, 1021 (C.D. Cal. 1998) (providing historical background of World War II military procurement). The WPB was authorized to allocate materials and facilities which it deemed to be in short supply and had the ability to require private companies to produce goods needed for the war effort "where it was within the company's physical and technical capacity to do so." *Id.* Roosevelt also created the Petroleum Administration for War [hereinafter PAW] in 1942 which was charged with overseeing the petroleum industry. *See id.* at 1022. One of the specific responsibilities of the PAW was instituting "a petroleum blending program under which it dictated the quantity and quality of avgas and required quarterly inventory reports from all refineries, authorized purchase of certain quantities of raw materials, and instructed refineries with respect to manufacturing specifications." *Id.*

41. *See Shell Oil*, 294 F.3d at 1049-50 (explaining government seizure power during war). Individuals who obstructed federal regulation of avgas production or government procurement of avgas were subject to criminal prosecution. *See Shell III*, 13 F. Supp. 2d at 1022.

42. *See Shell Oil*, 294 F.3d at 1049-50 (describing federal aid to assist in construction of avgas production facilities). In addition to low-cost loans, the United States provided financial assistance to refiners through the Defense Supplies Corporation [hereinafter DSC] and the Aviation Gas Reimbursement Plan [hereinafter AGRP]. *See Shell III*, 13 F. Supp. 2d at 1022-23. Through the DSC, the government entered into long-term avgas contracts with the goals of providing "financial incentives for building new facilities and [establishing] a centralized purchasing program over the entire output of avgas." *Id.* at 1023. The AGRP was a program which allowed oil companies that entered into long-term avgas contracts to seek reimbursement from the government for unanticipated expenses, such as the costs associated with government mandated reallocation of avgas raw materials between refineries. *See id.* The purpose of the AGRP was to compensate manufacturers for inefficiencies arising from the government's need for maximum overall avgas production. *See id.*

43. *See Shell Oil*, 294 F.3d at 1049-50 (explaining government control of avgas program).

the manner in which avgas was blended to allow for greater overall production, sometimes at the expense of an individual refiner's production, but never directly owned or controlled the manufacture of the separate avgas ingredients.⁴⁴

As the production of avgas increased, so too did the levels of waste.⁴⁵ Some refiners used a portion of the alkylation acid waste in other production capacities, resulting in another type of byproduct known as "acid sludge" which was both difficult and costly to reprocess.⁴⁶ Increased production of avgas, coupled with a shortage of reprocessing facilities, led the refiners to contract for the dumping of the accumulating acid sludge and alkylation acid.⁴⁷

B. The Comprehensive Environmental Response, Compensation and Liability Act

In 1980, Congress passed CERCLA as a response to public protest over several publicized instances of unsafe waste sites.⁴⁸ Although the CERCLA statute does not affirmatively state a purpose, legislative history suggests that it was intended both to provide for the cleanup of waste dumps and to serve as a vehicle for assigning liability to those who caused the damage.⁴⁹ CERCLA gives effect to this by naming four categories of responsible persons who can be

44. See *id.* at 1050 (describing Planned Blending Program). The Planned Blending Program required refiners to exchange raw materials between them to allow for greater overall production, sometimes resulting in additional cost and diminished output for individual refiners. See *id.* These additional costs were recoverable through the AGRP. See *Shell III*, 13 F. Supp. 2d at 1022-23.

45. See *Shell Oil*, 294 F.3d at 1051 (describing increased levels of hazardous waste generated as result of greater avgas production).

46. See *id.* (describing byproducts of avgas production). Acid sludge has a much lower acid content than alkylation acid and could not be reused in the refineries. See *id.*

47. See *id.* (describing motivation of refiners for dumping waste).

48. See James R. MacAyeal, *The Comprehensive Environmental Response, Compensation, and Liability Act: The Correct Paradigm of Strict Liability and the Problem of Individual Causation*, 18 UCLA J. ENVT'L. L. & POL'Y 217, 254-55 (2000/2001) (describing public atmosphere preceding CERCLA). Among these publicized incidents were Love Canal and Valley of the Drums. *Id.* CERCLA was signed into law by President Carter on December 11, 1980. See *id.* at 257.

49. See Theurer, *supra* note 3, at 78 (providing summary of CERCLA legislative history). The legislative history of CERCLA is somewhat confusing because the bill that passed as CERCLA was a combination of four prior legislative proposals. See MacAyeal, *supra* note 48, at 256-57 (explaining background of CERCLA). To deduce Congressional intent, courts have had to examine "the provisions in the competing precursors to CERCLA" and review "what was included and excluded in the final compromise." *Id.* at 258. Generally, the goals of CERCLA were the creation of a superfund to provide for the rehabilitation of waste sites and the imposition of liability upon "those responsible for the waste." See Theurer, *supra* note 3, at 78 (discussing Congressional intent of CERCLA legislation).

held strictly liable for the results of an actual or threatened release of a hazardous substance into the environment.⁵⁰ Pursuant to section 107, CERCLA allows liability to be placed upon: owners or operators of a facility; anyone who operated or owned a facility at the time of disposal of any hazardous substance; anyone who arranges for the disposal, treatment or transportation for purposes of disposal or treatment of hazardous waste; and anyone who accepts a hazardous substance for transport.⁵¹

A plaintiff must prove four elements to recover under CERCLA.⁵² First, the plaintiff must show that the site qualifies as a “facility” under CERCLA section 101(9).⁵³ Second, the plaintiff must demonstrate that there was a “release” or “threatened release” of a “hazardous substance.”⁵⁴ Third, the plaintiff must prove that the government incurred costs as a result of the release.⁵⁵ Finally, the plaintiff must show that the defendants qualify as one of the groups

50. See 42 U.S.C. § 9607(a) (1994) (prescribing parties who may be held liable under CERCLA); see also MacAyeal, *supra* note 48, at 218 (discussing strict liability under CERCLA).

51. See 42 U.S.C. § 9607(a) (1994). CERCLA allows the following to be held liable for the costs of hazardous waste cleanup:

(1) the owner and operator of a vessel or a facility, (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of, (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance

Id.

52. See Nilsson, *supra* note 5, at 4 (explaining causation requirements for CERCLA liability).

53. See Theurer, *supra* note 3, at 79 (stating elements for liability under CERCLA); see also 42 U.S.C. § 9601(9)(B) (defining “facility” as “any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located . . .”).

54. See 42 U.S.C. § 9601(22) (defining “release” as “any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant) . . .”).

55. See Nilsson, *supra* note 5, at 4 (explaining that liability for costs includes both immediate and continuous remedial expenses incurred by federal or state governments, or others if they are consistent with national contingency plan).

specifically targeted for liability by section 107.⁵⁶ CERCLA provides only limited affirmative defenses, specifically that the release was caused by either an “act of God,” an “act of war,” or by an “act or omission of a third party.”⁵⁷

C. Sovereign Immunity under CERCLA

Well-established law mandates that the United States is liable to suit only to the degree to which it consents to be sued.⁵⁸ Moreover, any waiver of sovereign immunity must be clear and unequivocal and is not to be expanded by the judiciary.⁵⁹

Pursuant to section 120(a)(1) of CERCLA, “[e]ach department, agency, and instrumentality of the United States (including the executive, legislative, and judicial branches of government) shall be subject to, and comply with, this Act in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 107 of this Act.”⁶⁰ In section 101, CERCLA also specifically includes the United States in the definition of “person” who may be sued under the statute.⁶¹

56. See Andrea R. Proscs, Note, *Johnson v. James Langley Operating Company: Must Innocent Parties Foot the Bill Simply To Have a Little Peace of Mind?*, 13 VILL. ENVTL. L.J. 349, 356-61 (2002) (discussing requirements for proving link between release of hazardous substances and incurring cleanup costs).

57. See 42 U.S.C. § 9607(b) (1994) (prescribing affirmative defenses which must be proven by preponderance of evidence); see also Theurer, *supra* note 3, at 79-80 (summarizing affirmative defenses as prescribed by CERCLA section 107). Courts have interpreted these defenses very narrowly. *Id.*

58. See, e.g., *United States v. Sherwood*, 312 U.S. 584, 586 (1941) (declaring that “[t]he United States, as sovereign, is immune from suit save as it consents to be sued . . .”); *United States v. Testan*, 424 U.S. 392, 399 (1976) (holding that United States may only be sued to extent provided for by Congress).

59. See *Irwin v. Dep’t of Veterans Affairs*, 498 U.S. 89, 95 (1990) (holding that waivers of government’s sovereign immunity must be expressed unequivocally).

60. 42 U.S.C. § 9620(a)(1) (declaring application of CERCLA to federal government); see also Theurer, *supra* note 3, at 82 (detailing “competing concepts” of CERCLA immunity waiver). Courts have had difficulty applying the CERCLA waiver in cases where the government acts as a regulator, not as a person. See *id.* Courts have upheld government immunity in circumstances when the government is regulating the cleanup of a site, but have found waiver of immunity when the government is involved in more than just the cleanup. See *id.*

61. See 42 U.S.C. § 9601(21) (including “United States Government” in definition of “person”). CERCLA defines person as “an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body.” *Id.*

The Supreme Court addressed federal immunity under CERCLA, for the first and only time, in *Pennsylvania v. Union Gas Co.*⁶² Although the cause of action in *Union Gas* was against a state, the Court addressed federal immunity, stating in dicta that section 120(a)(1) of CERCLA was an “unequivocal expression of the Federal Government’s waiver of its own sovereign immunity.”⁶³ While parts of the *Union Gas* opinion relating to states’ immunity have been overturned, courts continue to abide by the finding of a federal immunity waiver.⁶⁴

Prior to the Ninth Circuit in *Shell Oil*, only a few federal appellate circuit courts issued opinions on the CERCLA sovereign immunity waiver.⁶⁵ In *FMC Corporation v. United States Department of Commerce*,⁶⁶ the Third Circuit ruled that CERCLA section 120(a)(1) unequivocally waived federal immunity, holding that “when the government engages in activities that would make a private party liable if the private party engaged in those types of activities, then the government is also liable.”⁶⁷ In *East Bay Municipal Utility District v. United States Department of Commerce*,⁶⁸ the District of Columbia Circuit likewise found CERCLA to waive immunity, declaring that “the waiver of immunity contained in [section 120(a)(1)] is coex-

62. See *Union Gas*, 491 U.S. 1, 1 (1989) (finding Section 120(a)(1) of CERCLA to be waiver of United States sovereign immunity).

63. *Id.* at 10 (comparing language of CERCLA section 120(a)(1) with section 101(20)(D) to find intent to waive sovereign immunity of individual states). The issue in *Union Gas* was whether Pennsylvania could be held liable as an operator under CERCLA for the state’s participation in causing a tar leak on property owned by the plaintiff. See *id.* at 5-6. The Supreme Court found that the states could be liable under CERCLA. See *id.* at 13.

64. See *Shell Oil*, 294 F.3d 1045, 1052 (9th Cir. 2002) (citing *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), as overturning *Union Gas* finding that states are liable under CERCLA). The waiver of sovereign immunity as applied to the United States pursuant to CERCLA Section 120(a)(1) has been consistently upheld. See, e.g., *East Bay Mun. Util. Dist. v. United States Dep’t of Commerce*, 330 U.S. App. D.C. 31 (D.C. Cir. 1998) (finding waiver of immunity contained in section 9620(a)(1) to be coextensive with scope of CERCLA liability standards); *United States v. Allied Corp.*, 1990 U.S. Dist. LEXIS 20061 (N.D. Cal. Apr. 24, 1990) (finding United States Navy liable under CERCLA for environmental contamination of neighboring property); *Rospatch Jessco Corp. v. Chrysler Corp.*, 829 F. Supp. 224 (W.D. Mich. 1993) (finding 42 U.S.C. section 9620(a) to waive sovereign immunity for federal facilities); *Chesapeake & Potomac Tel. Co. of Virginia v. Peck Iron & Metal Co.*, 814 F. Supp. 1281, 1285 (E.D. Va. 1993) (holding that “CERCLA plainly intends to hold the government liable to the same extent as nongovernmental entities . . .”).

65. See *FMC*, 29 F.3d 833, 840 (3d Cir. 1994) (providing background of judicial inquiry into CERCLA sovereign immunity waiver).

66. 29 F.3d 833 (3d Cir. 1994).

67. *Id.* at 840 (explaining CERCLA waiver of sovereign immunity).

68. 142 F.3d 479 (D.C. Cir. 1998).

tensive with the scope of the substantive liability standards of CERCLA."⁶⁹

D. Federal Arranger Liability under CERCLA

Arrangers are one of the four classes of persons for whom CERCLA assigns liability.⁷⁰ Although CERCLA attempts to distinguish each class individually, courts have found elements of control and ownership to apply to a few of the classes, resulting in a somewhat confusing analysis.⁷¹

Several cases have dealt with the issue of arranger liability. In *United States v. Northeastern Pharmaceutical & Chemical Co. (NEPACCO)*,⁷² the Eighth Circuit attempted to clarify the application of CERCLA as well as the requirements for being an arranger.⁷³ *NEPACCO* centered on the issue of liability against officers of a corporation to recover the costs of cleaning up a site used by the corporation to dump drums of chemical waste.⁷⁴ The Eighth Circuit first held that Congress intended CERCLA to be applied retroactively, thus making it a viable tool to recover for acts committed prior to 1980.⁷⁵ The court further held the corporate officers liable as arrangers, stating that "[i]t is the authority to control the handling and disposal of hazardous substances that is critical under the statutory scheme."⁷⁶

In *United States v. Aceto*,⁷⁷ the Eighth Circuit revisited arranger liability.⁷⁸ The issue in *Aceto* was whether pesticide manufacturers

69. *Id.* at 481 (finding CERCLA waiver of sovereign immunity).

70. For a discussion of parties identified for potential liability under CERCLA, see *supra* note 51 and accompanying text.

71. See Nilsson, *supra* note 5, at 36 (explaining that courts have given CERCLA broad interpretation and that ownership is relevant to liability for both "owners" and "arrangers").

72. 810 F.2d 726 (8th Cir. 1986).

73. See *United States v. Northeastern Pharmaceutical & Chemical Co.*, 810 F.2d 726, 732 (8th Cir. 1986) [hereinafter *NEPACCO*] (providing method for CERCLA analysis).

74. See *id.*, 810 F.2d at 729-31 (explaining facts of case). The relevant Defendants in the case included the supervisor of the manufacturing plant and the president of the corporation that owned the plant. See *id.* at 729.

75. See *id.* at 732-37 (discussing Congressional intent to apply CERCLA retroactively). The court found support for a retroactive application of CERCLA in the statute's legislative history. See *id.* at 733 (citing H.R. 1016, 96th Cong. (1980)).

76. *Id.* at 743 (stating finding of individual liability). The court held that arranger liability does not require "proof of personal ownership or actual physical possession of hazardous substances," but rather turns on the degree of control the defendants possessed over the material. See *id.*

77. 872 F.2d 1373 (8th Cir. 1989).

78. See *id.* at 1375 (revisiting liabilities under CERCLA).

could be held liable for the costs of cleaning up a contaminated site that was once operated by a now bankrupt corporation who used the site to mix and process chemicals for the manufacturers.⁷⁹ The court found the manufacturers liable, declaring that it was their ownership of the processed chemicals that raised them to the level of arranger.⁸⁰

More recently, both the Third and Eighth Circuits have provided insight into the issue of United States liability under CERCLA. In *FMC*, the Third Circuit considered a suit against the United States seeking costs associated with cleaning up hazardous waste deposited at a site used to produce high tenacity rayon during World War II.⁸¹ The plaintiffs established that the United States was heavily involved with this plant during the war, evidenced by three facts: first, that the government installed and leased to the plant owner government owned machinery; second, that the government built and owned an adjacent acid plant next to the facility to provide the rayon manufacturers with materials; finally, that the government directly controlled the rayon manufacturing process.⁸² After initially finding that the United States waived sovereign immunity pursuant to section 120(a)(1) of CERCLA, the court found the United States liable as an "operator."⁸³ Although the district court had previously found the government also liable as an arranger, the circuit court was evenly split on the issue and declined from issuing an opinion on the matter.⁸⁴

The Eighth Circuit provided a more definitive opinion when it addressed federal arranger liability in *United States v. Vertac Chemical*

79. See *United States v. Aceto*, 872 F.2d at 1375-76 (describing facts of case). The Environmental Protection Agency [hereinafter EPA] sought to recover costs incurred in cleaning up a facility owned by the bankrupt Aidex Corporation. See *id.* at 1375. Aidex was a pesticide formulator who mixed pesticide ingredients for pesticide manufacturers according to the specifications of the manufacturers. See *id.* This action was aimed at the manufacturers, whom the EPA claimed were arrangers for purpose of CERCLA liability. See *id.*

80. See *id.* at 1381 (noting that some courts have imposed CERCLA liability where defendants sought to characterize their disposal arrangement as "sale").

81. See *FMC*, 29 F.3d 833, 835 (3rd Cir. 1994). The plant at issue was not originally used to manufacture rayon, but was converted to such at the behest of the Federal Government following the attack at Pearl Harbor. *Id.* Due to a rubber shortage, the government placed a high priority on the production of high tenacity rayon for use as a supplement in the manufacture of tires. *Id.*

82. See *id.* at 837-38 (describing federal oversight of rayon production).

83. See *id.* at 842, 845 (analyzing government role in manufacturing process).

84. See *id.* at 845-46 (declining to issue opinion). By not issuing an opinion, the court affirmed the district court holding that the United States was liable as an arranger. *Id.* at 846.

Corporation.⁸⁵ *Vertac* involved the cleanup of waste generated by the manufacture of Agent Orange during the Vietnam War.⁸⁶ The United States purchased the chemical from independent manufacturers under rated contracts which mandated strict product specifications.⁸⁷ The government facilitated the purchase of ingredients and performed inspections of the production facility; however, the government never owned any of the raw materials used in manufacture.⁸⁸ Although the Eighth Circuit acknowledged that the government should have been aware that the production of Agent Orange would result in toxic waste, the government never knew how the manufacturer was disposing of the waste.⁸⁹ The court declined to find that the United States was an arranger.⁹⁰ Under the court's CERCLA analysis, the government could not be an arranger because it never owned or possessed the hazardous materials and that the government's regulatory authority over the manufacturing process was not enough to prove possession.⁹¹

IV. NARRATIVE ANALYSIS

In reviewing the *Shell Oil* decision of the district court, the Ninth Circuit Court of Appeals had two issues to resolve. First, whether the United States waived its sovereign immunity for purposes of liability under CERCLA.⁹² Second, assuming the United States waived immunity, whether its participation in the McColl

85. See *United States v. Vertac Chem. Corp.*, 46 F.3d 803, 805 (8th Cir. 1995) (dismissing claim of federal arranger liability).

86. See *id.* at 806 (describing basis for CERCLA claim). Agent Orange, a mixture of 2,4-dichlorophenoxyacetic acid and 2,4,5-trichlorophenoxyacetic acid, was an herbicide used by the United States military as a defoliant in Vietnam. *Id.*

87. See *id.* (reciting facts of case). When a contract is "rated", it is given priority over other contracts, on the theory, "that it is deemed necessary or appropriate to promote national defense." *Id.*

88. See *id.* at 807 (noting that United States did not hold any financial ownership interest in land, buildings, tools, machinery or equipment during production of Agent Orange).

89. See *id.* (showing that rated contracts between Hercules and United States did not address manner in which Hercules was to handle waste generated by production of Agent Orange).

90. See *Vertac*, 46 F.3d at 811 (concluding that United States actual involvement in operations of Jacksonville facility was sporadic and minimal).

91. See *id.* (noting that United States neither actively nor constructively supplied Hercules with raw materials). The court differentiated *Vertac* from *NEPACCO* in that the *NEPACCO* defendants had immediate supervisory and direct responsibility for the manufacturing process whereas the role of the government in *Vertac* was merely regulatory. See *id.* at 810.

92. For a discussion of the Ninth Circuit's analysis in *Shell Oil* of sovereign immunity pursuant to CERCLA, see *infra* notes 94-98 and accompanying text.

waste raised them to the level of an arranger, and therefore, subject to liability under CERCLA.⁹³

A. Sovereign Immunity

The Ninth Circuit explained that to find a relinquishment of immunity, there must be an “unequivocal expression of intent” to give up immunity; this waiver must be “unambiguous” and “strictly construed in favor of the sovereign.”⁹⁴ The United States argued that the section 120(a)(1) waiver was limited to instances in which the government carried out “nongovernmental” activities, evidenced both by the fact that section 120 was listed under the heading “Federal Facilities” and by the theory that “the phrase making the government subject to [liability under] CERCLA ‘in the same manner and to the same extent . . . as any nongovernmental entity’ restricts the waiver of sovereign immunity to situations in which the government acts as a ‘nongovernmental entity.’”⁹⁵ The Court of Appeals disagreed and instead followed the Third Circuit’s *FMC* opinion, rejecting the idea that the heading “Federal Facilities” was determinative of a desire to limit federal liability.⁹⁶ In upholding the district court finding of a sovereign immunity waiver, the Court of Appeals referred to *Union Gas* to hold that CERCLA section 120(a)(1) serves as an unequivocal waiver of the Federal Government’s immunity from suit.⁹⁷ The court further found that the United States had previously been held liable under CERCLA for

93. For a discussion of the Ninth Circuit’s analysis of federal arranger liability in *Shell Oil*, see *infra* notes 99-111 and accompanying text.

94. See *Shell Oil*, 294 F.3d 1045, 1051 (9th Cir. 2002) (citing *Lane v. Pena*, 518 U.S. 187, 192 (1996)). *Lane* held that those “suing the United States must point to an ‘unequivocal expression’ of intent to waive sovereign immunity.” *Id.*

95. See *id.* at 1052 (stating government’s argument against CERCLA immunity waiver).

96. See *id.* at 1052-53 (providing basis for upholding federal waiver of sovereign immunity). The Ninth Circuit pointed out an inherent flaw in the government’s argument by showing that the heading “Federal Facilities,” upon which the government based its argument, was not incorporated into CERCLA until 1986, six years after the section 9620 waiver was passed. See *id.* The Ninth Circuit held that the heading “Federal Facilities” was adopted merely for organizational purposes and was not intended to modify the section 9620 immunity waiver. See *id.*

97. See *id.* at 1052 (citing *Union Gas*, 491 U.S. 1 (1989)). The Ninth Circuit additionally referred to *East Bay*, 142 F.3d 479, 482 (D.C. Cir. 1998), holding that CERCLA section 9628 “does not, on its face, ‘suggest a distinction between the exercise of private . . . and regulatory powers’” and *FMC*, 29 F.3d 833, 841-42 (3rd Cir. 1994) which held that “the relevant sovereign immunity question under CERCLA is . . . whether [the government’s] activities, however characterized, are sufficient to impose liability on the government as an owner, operator, or arranger.” *Shell Oil*, 294 F.3d at 1053.

"governmental" acts and that fear of a floodgate of litigation was exaggerated.⁹⁸

B. Arranger Liability

Although the Oil Companies only argued for a broad interpretation of arranger liability, the district court found the United States liable under both a "direct arranger" theory as well as under the broader theory advocated by the refiners.⁹⁹ Under the direct theory, an arranger must have "direct involvement in the arrangements for the disposal of waste" to be held liable.¹⁰⁰ The district court believed that governmental intervention in facilitating the lease of a storage tank, coupled with the evidence of a letter from the PAW in which the agency declared acid sludge disposal to be a problem of the WPB, was enough to show direct involvement.¹⁰¹ The Ninth Circuit Court of Appeals disagreed and found these facts "insufficient" to prove direct governmental participation in the disposal of acid waste at McColl.¹⁰²

The Ninth Circuit likewise declined to find liability under the broad arranger theory.¹⁰³ While the district court relied upon the Eighth Circuit's *Aceto* opinion and the Oil Companies urged that *NEPACCO* provided additional support for arranger liability, the Ninth Circuit dismissed the relevance of these decisions.¹⁰⁴ The

98. See e.g., *Allied Corp.*, 1990 U.S. Dist. LEXIS 20061 (N.D. Cal. Sept. 18, 1995) (finding United States Navy liable under CERCLA for authorizing demolition causing release of hazardous substances).

99. See *Shell II*, 1995 U.S. Dist. LEXIS 19778, at *19-20 (applying arranger theories).

100. *Shell Oil*, 294 F.3d at 1055 (citing *Cadillac Fairview/California Inc. v. United States*, 41 F.3d 562 (9th Cir. 1994) as example of case involving traditional direct arranger liability). The Ninth Circuit in *Cadillac Fairview* held rubber companies liable as arrangers for transferring contaminated styrene to Dow Chemical for purposes of reprocessing. See *Cadillac Fairview*, 41 F.3d at 566.

101. See *Shell II*, 1995 U.S. Dist. LEXIS 19778, at *24-25 (holding that "once an entity undertakes to arrange for disposal or treatment, it cannot abdicate responsibility when the disposal becomes infeasible.").

102. See *Shell Oil*, 294 F.3d at 1055 (overruling district court opinion).

103. See *id.* at 1059 (stating holding of case). The "broad" theory of arranger liability was espoused by the district court in *Shell II*. See *Shell II*, 1995 U.S. Dist. LEXIS 19778, at *20. This broad theory, based upon *Aceto*, holds that "a party is liable as an arranger (1) if it supplies raw materials to be used in making a finished product, (2) and it retains ownership or control of the work in process, (3) where the generation of hazardous substances is inherent in the production process." *Id.*

104. See *Shell Oil*, 294 F.3d at 1055-58 (failing to see relevance of *Aceto* or *NEPACCO*). The Oil Companies argued that, under *NEPACCO*, neither ownership nor control were required for arranger liability; that the authority to control was enough. See *id.* at 1057 (discussing Oil Company's argument under *NEPACCO*); see also *NEPACCO*, 810 F.2d 726, 743 (8th Cir. 1986) (stressing importance of control).

Ninth Circuit instead applied *FMC* and *Vertac*.¹⁰⁵ Under the *FMC* analysis, the Ninth Circuit compared the facts of *Shell Oil* to those of *FMC*.¹⁰⁶ The Ninth Circuit found the level of government control in *FMC* to be greater than that in *Shell Oil* and therefore more conducive to a finding of an arranger relationship.¹⁰⁷ The Ninth Circuit concluded that because the Third Circuit in *FMC* was unwilling to find an arranger relationship, even with the high level of government control, it would be unreasonable for the court to now find an arranger relationship when control was more attenuated.¹⁰⁸ The Ninth Circuit then compared the *Shell Oil* facts to those of the *Vertac* case.¹⁰⁹ In *Vertac*, the Eighth Circuit declined to hold the United States liable as an arranger under a relationship very similar to that of the government in *Shell Oil*.¹¹⁰ The Ninth Circuit found this decision persuasive and held that actual control requires the obligation to control waste disposal, not merely the authority to control.¹¹¹

V. CRITICAL ANALYSIS

A. Sovereign Immunity

Considering the unequivocal expression of waiver contained in the statute, the primary weakness of the government's argument against waiver, and the clarity of prior case law, it was virtually certain that the Ninth Circuit would uphold the District Court's find-

105. See *Shell Oil*, 294 F.3d at 1058 (finding *FMC* and *Vertac* decisions to be more applicable).

106. See *id.* (stating that *FMC* court declined to find United States liable as "arranger" even though government owned machinery used in plant owner's factory).

107. See *id.* at 1058-59 (comparing facts of *Shell Oil* to facts of *FMC*). For a discussion of the facts and holding of *FMC*, see *supra* notes 81-84 and accompanying text.

108. See *Shell Oil*, 294 F.3d at 1059 (declining to find United States liable as arranger).

109. See *id.* (comparing facts of *Shell Oil* to facts of *Vertac*). For a discussion of the facts and holding of *Vertac*, see *supra* notes 85-91 and accompanying text.

110. See *Shell Oil*, 294 F.3d at 1058-59 (comparing *Shell Oil* circumstances with those of *Vertac*). The *Shell Oil* court stressed that in both *Vertac* and *Shell Oil*: products were manufactured for purchase by the United States in wartime, . . . the manufacturing was carried out under government contracts and pursuant to government programs that gave it priority over other manufacturing, . . . [and that] the United States was aware that waste was being produced, but did not direct the manner in which the companies disposed of it.

Id. at 1059.

111. See *id.* (stating that although level of government control in *Shell Oil* was greater than in *Vertac*, "this was a matter of degree rather than kind.").

ing of a waiver of immunity under CERCLA.¹¹² The Ninth Circuit justifiably found CERCLA section 120(a)(1) to be an obvious surrender of federal immunity to the extent that section 107 would impose liability upon a private party.¹¹³ Section 120(a)(1) provides that “[e]ach department, agency and instrumentality of the United States . . . shall be subject to, and comply with this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section [107] of this title.”¹¹⁴ In addition to section 9620, Congress further provided for federal liability under section 101(21) by including the United States in the class of “persons” who may be sued under CERCLA.¹¹⁵ Thus, after recognizing two separate and deliberate statutory expressions, the court wisely upheld the waiver.¹¹⁶

The tenuous arguments made by the United States serve to provide greater support for a finding of waiver.¹¹⁷ Although the United States correctly pointed out that the section 120 waiver falls within the “Federal Facilities” heading, the government’s hypothesis that Congress only intended to waive immunity in respect to federally owned facilities is flawed.¹¹⁸ The Ninth Circuit explained that when CERCLA was first adopted in 1980, there was no “Federal Facilities” heading above section 120; the heading was incorporated in 1986 for purposes of organization and there was never any intent to change the original scope of the waiver.¹¹⁹

Additionally, prior case law overwhelmingly supports the court’s holding.¹²⁰ The Supreme Court’s matter-of-fact statement in *Union Gas* that the federal government unquestionably waived sovereign immunity under CERCLA suggests that this issue is set-

112. See *Government’s Liability is not Limited to ‘Nongovernmental’ Activities*, Real Estate/Environmental Liability News, Mar. 1, 2002 [hereinafter *Government’s Liability*] (suggesting possible implication from *Shell Oil* decision).

113. See *Shell Oil*, 294 F.3d at 1053 (stating “[if CERCLA § 107] provides for liability, then [§ 120(a)(1)] waives sovereign immunity to that liability.”).

114. 42 U.S.C. § 9620(a)(1) (1994).

115. See 42 U.S.C. § 9601(21) (1994) (defining who may be found liable under CERCLA).

116. See *Shell Oil*, 294 F.3d at 1053 (stating that there was no language in waiver of immunity provision that “would have limited the scope of the waiver.”).

117. See *id.* at 1052-53 (presenting United States arguments against CERCLA sovereign immunity waiver).

118. See *id.* at 1052-53 (discussing gradual changes to CERCLA statute).

119. See *id.* (clarifying that “Federal Facilities” heading was added for organizational benefit only).

120. See *id.* at 1053 (mentioning that only two circuits have ruled on question of sovereign immunity under CERCLA, with both holding that sovereign immunity was waived).

tled and unworthy of significant debate.¹²¹ This interpretation is further buttressed by the Third Circuit's similar opinion in *FMC* and the District of Columbia's opinion in *East Bay*.¹²² By adhering to prior case law, the Ninth Circuit preserves a sense of predictability and judicial order for future litigants.¹²³

B. Arranger Liability

1. Application of case law

While the district court relied primarily upon *Aceto* and *NEPACCO* to find the United States liable, the Ninth Circuit emphasized *FMC* and *Vertac* to overturn the government's liability.¹²⁴ The Ninth Circuit dismissed the importance of *Aceto* by focusing on the level of control of the polluting chemicals.¹²⁵ According to the court's theory, *Aceto* is inapplicable because the government was not an owner of the chemicals.¹²⁶ While the court is correct that the government never owned the chemicals, the logic in basing its opinion upon this distinction is elusive.¹²⁷ CERCLA, in defining arranger accountability, establishes that both those who own or possess hazardous substances may be liable.¹²⁸ Instead of dismissing *Aceto*'s relevance because the government did not own the chemicals, the Ninth Circuit should have examined the levels of control demonstrated by the government.¹²⁹

121. See *Union Gas*, 491 U.S. 1, 10 (1989) (stating that CERCLA sovereign immunity waiver applies to federal government).

122. For a discussion of *FMC* and *East Bay* in the context of sovereign immunity, see *supra* notes 65-69 and accompanying text.

123. See *Government's Liability*, *supra* note 112 (stating that *Shell Oil* court adhered to prior opinions of other circuits).

124. See *Shell Oil*, 294 F.3d at 1054-59 (focusing on *FMC* and *Vertac* rather than *Aceto* and *NEPACCO*).

125. See *id.* at 1056 (finding *Aceto* unpersuasive). Whereas the defendants in *Aceto* actually owned the chemicals, the government in *Shell Oil* merely assisted the manufacturer in procuring chemicals and expressed regulatory control over the production process; the government never owned the chemicals and was only an "end purchaser of avgas." See *id.*

126. See *id.* (dismissing relevance of *Aceto*).

127. See *Shell II*, 1995 U.S. Dist. LEXIS 19778, at *22-25 (C.D. Cal. Sept. 18, 1995) (analyzing "ownership" standards under *Aceto*).

128. See 42 U.S.C. § 9607(a)(1994) (listing those eligible for CERCLA liability).

129. See e.g., *Shell II*, 1995 U.S. Dist. LEXIS 19778, at *22 (finding government regulation of avgas components so severe as to amount to government being akin to supplier). The court stated:

[w]hen the Government, as a practical matter orders a private company to supply a finished product, dictates the delivery dates, the quantity to be shipped, the prices of the materials, the specifications of the raw materi-

The Ninth Circuit was likewise unpersuaded by the *NEPACCO* holding.¹³⁰ The court rejected the Oil Companies' argument that *NEPACCO* stood for the idea that neither ownership nor actual control are determinative for a finding of arranger liability and that mere authority to control was sufficient.¹³¹ The Ninth Circuit instead held that actual control was requisite and, failing to find any actual control by the government in *Shell Oil*, refrained from imposing liability.¹³² The level of government control in avgas production was extreme: the government was actively involved in overseeing the blending of avgas, it assisted in the acquisition of the chemicals, it strictly monitored the inventory levels at the refineries, it forced refineries to maximize all existing capacity towards avgas production, it assisted in the financing of new avgas production facilities, it facilitated the lease of storage tanks, and evidence suggests that the government was at least latently aware of the dumping at the McColl site.¹³³ Although none of these acts may individually raise the government's involvement to the level of actual control, taken in the aggregate, actual control seems apparent.¹³⁴ By focusing on the trees of individual facts, the Ninth Circuit failed to see the forest of governmental control present in *Shell Oil*.¹³⁵

The Ninth Circuit partially based its opinion upon *FMC*.¹³⁶ The Ninth Circuit reasoned that, because the Third Circuit in *FMC* was unable to reach a majority opinion on whether or not the United States was liable as an arranger and because the facts of *FMC* seemed to suggest a greater level of governmental control than was

als, and provides the transportation for the raw materials, there can be no question but that it is 'supplying' the raw materials

Id.

130. See *Shell Oil*, 294 F.3d 1057-58 (rejecting Oil Company's *NEPACCO* argument).

131. See *NEPACCO*, 810 F.2d 726, 743 (8th Cir. 1986) (finding corporate officer liable under CERCLA as arranger because he possessed authority to control handling and disposal of hazardous substances).

132. See *Shell Oil*, 294 F.3d at 1057 (stressing importance of actual control). The Ninth Circuit held actual control is requisite to finding liability. See *id.*

133. See *Shell II*, 1995 U.S. Dist. LEXIS 19778, at *23-24 (recounting numerous ways government expressed control over avgas production).

134. See *id.* at *23 (finding government control to be persuasive). The district court stated "the question is 'whether the fact-finder could infer from all the circumstances 'that a transaction in fact involves an arrangement for the disposal or treatment of a hazardous substance.'" See *id.* at *21 (quoting *Cadillac Fairview*, 41 F.3d 562, 562 (9th Cir. 1994)).

135. See *id.* at *25 (holding government liable as arranger).

136. See generally *FMC*, 29 F.3d 833 (3rd Cir. 1994) (holding government liable as arranger).

present in *Shell Oil*, they should not find arranger liability.¹³⁷ Regrettably, the Ninth Circuit failed to disclose that the district court in *FMC* had found enough evidence for arranger liability and that, because the circuit court could not agree on a reason to overrule the district court and instead refrained from issuing an opinion on arranger liability, the circuit court allowed the district court finding of arranger liability to stand.¹³⁸ Moreover, because the Third Circuit found the government liable under an operator theory, the need to find them additionally liable as arrangers was not pressing.¹³⁹ Reliance upon *FMC* to find governmental non-liability appears unsound.¹⁴⁰

The Ninth Circuit also relied upon the Eighth Circuit's *Vertac* decision.¹⁴¹ In *Vertac*, the United States was exonerated from liability as an arranger because the government neither owned the chemicals used in the manufacturing process nor expressed actual control in the production.¹⁴² While the rationale applied in *Vertac* is very similar to the rationale employed by the Ninth Circuit in *Shell Oil*, the facts of *Vertac* are sufficiently different to make the Ninth Circuit's reliance upon *Vertac* misguided.¹⁴³ The level of control employed by the United States in regard to Agent Orange production pales in comparison to the near totality expressed over avgas during World War II.¹⁴⁴ The Ninth Circuit stressed that control was the key element in *Shell Oil*, therefore the question remains as to why the Ninth Circuit would rely so heavily upon *Vertac* when the level of control between the two cases was in such contrast.¹⁴⁵

137. See *Shell Oil*, 294 F.3d at 1058-59 (utilizing *FMC* to refrain from finding federal arranger liability). The Ninth Circuit stated "[i]f it was a close question on the facts of *FMC* whether the United States was an arranger, it cannot possibly be a close question on the facts in the case before us." *Id.* at 1058.

138. See *FMC*, 29 F.3d at 846 (stating that "[t]he court is equally divided on this point and consequently we will affirm the judgment of the district court holding the government liable as an arranger without discussion.").

139. See *id.* at 844 (finding United States liable as operator under CERCLA).

140. See *id.* (basing finding of United States liability as operator on "substantial control" government exercised over corporation).

141. See generally *Vertac*, 46 F.3d 803 (8th Cir. 1995) (dismissing claim of arranger liability against United States in connection with oversight of Agent Orange production).

142. See *id.* at 810-12 (analyzing arranger argument).

143. The Eighth Circuit in *Vertac* suggested in dicta that government coercion or intervention may be enough to meet the level of control necessary for an arranger. See *Vertac*, 46 F.3d at 811.

144. See Nilsson, *supra* note 5, at 36 (stating that there is no bright line rule under CERCLA for when entities achieve status of arranger; courts have found broad application to be necessary to meet Congressional intent).

145. See *Vertac*, 46 F.3d at 806 (providing details of Agent Orange production contracts). In contrast to the urgent demand for avgas which necessitated a gov-

2. *Failure to give proper deference to the apparent motivation of Congress*

Although Congress never incorporated a statement of intent into CERCLA, legislative history shows that CERCLA was intended as a means of placing the cost of hazardous waste cleanup on those responsible for the waste being released.¹⁴⁶ *Shell Oil* runs counter to this intention.¹⁴⁷ As stated by the *FMC* court, placing “a cost of the war on the United States, and thus on society as a whole, . . . is neither untoward nor inconsistent with the policy underlying CERCLA.”¹⁴⁸ The district court echoed this sentiment when it stated, “[I]t stands to reason that just as the American people stood to benefit from the successful prosecution of the war effort, so too must the American public bear the burden of a cost directly and inescapably created by the war effort, the production of avgas waste.”¹⁴⁹

VI. IMPACT

In 1996 it was estimated that the cost of cleaning up defense contract sites will be near four hundred billion dollars.¹⁵⁰ As this liability continues to be realized, litigation is certain to follow.¹⁵¹ How *Shell Oil* will be interpreted in these future actions remains to be seen, but certain impacts seem likely. Primarily, *Shell Oil* will stand for the proposition that the United States has waived sover-

ernmental order requiring all avgas producers to maximize production, Agent Orange was only obtained from select manufacturers through a competitive bidding process. *See id.*

146. *See Nilsson, supra* note 5, at 29 (explaining that CERCLA’s main concern is remediation of contaminated sites, not levying of penalties).

147. *See generally*, Evan Halper, *Oil Firms Lose Cleanup Appeal*, Los Angeles Times, California Metro; Part 2; Page 3, June 29, 2002 (stating that residential neighbors of McColl site have taken sides with oil companies). The current McColl residents believe that the oil companies “were key in cleaning the property and that the government should take responsibility for the pressure it put on companies to produce during the war.” *Id.*

148. *See FMC*, 29 F.3d 833, 846 (3rd Cir. 1994) (explaining that responsibility for amending broadly applicable statutes rests with Congress, not judiciary).

149. *Shell III*, 13 F. Supp. 2d 1018, 1027 (C.D. Cal. 1998) (explaining appropriateness of holding government liable for avgas waste under CERCLA). The district court reiterated its point, saying that “[i]n looking at the CERCLA statute, it appears to the court that Congress must thereby have had in mind unusual cases such as this.” *Id.* at 1030.

150. *See Theurer, supra* note 3, at 67 (estimating nationwide cost for cleaning up federal defense contract sites).

151. *See* Major Randall James Bunn, *Contractor Recovery for Current Environmental Cleanup Costs Under World War II-Era Government Contract Indemnification Clauses*, 41 A.F. L. REV. 163, 163 (1997) (explaining that potentially responsible parties will be spurred towards litigation due to excessive costs associated with CERCLA cleanup).

eign immunity to the extent of CERCLA section 107.¹⁵² With the Third Circuit, the District of Columbia Circuit and now the Ninth Circuit all finding a federal waiver under CERCLA, this issue seems nearly settled.¹⁵³

Although suing the government will be easier, winning a suit will not.¹⁵⁴ *Shell Oil* will be interpreted as requiring actual control for arranger liability under CERCLA.¹⁵⁵ To be liable as an arranger, *Shell Oil* will require a party to have owned, possessed or have both the authority and the obligation to dispose of hazardous materials.¹⁵⁶ Because of these strict requirements, *Shell Oil* will make it more difficult for private parties to shift the liability for cleanup costs to the government.¹⁵⁷

However unlikely, there remains a possibility of legislative intervention.¹⁵⁸ Because the Ninth Circuit has restricted governmental arranger liability to instances of actual control, CERCLA has been limited in a manner not necessarily envisioned by Con-

152. For a discussion of the CERCLA section 107 waiver of sovereign immunity, see *supra* notes 58-69 and 94-98 as well as accompanying text.

153. See generally *FMC*, 29 F.3d 833 (finding CERCLA to contain waiver of sovereign immunity); *East Bay*, 142 F.3d 479 (D.C. Cir. 1998) (holding that CERCLA immunity waiver is coextensive with scope of CERCLA liability). The Eighth Circuit also implied that CERCLA contains a waiver of sovereign immunity by analyzing governmental involvement in a manner similar to that of a private operator. See *Vertac*, 46 F.3d 803 (8th Cir. 1995) (examining federal government for liability under CERCLA).

154. See Clare Bienvenu, Note, *United States v. Shell Oil Co.: The Tension of CERCLA Arranger Liability for Government Wartime Production Facilities*, 16 TUL. ENVTL. L.J. 199, 210-11 (2002) (stressing difficulty of proving that government regulatory actions raise government into level of owner, operator, arranger or transporter).

155. See *Shell Oil*, 294 F.3d at 1057-58 (stating requirements for arranger liability).

156. See Locke Liddell & Sapp LLP, *Ninth Circuit Limits of Arranger Liability Under CERCLA*, Texas Environmental Compliance Update, Volume 11, Issue 3 (May 2002) (explaining that value of *Shell Oil* decision is found in its explanation of requirements for arranger liability).

157. See Bienvenu, *supra* note 154, at 211-12 (suggesting that Ninth Circuit could have provided better roadmap for future litigants by conducting NEPACCO "authority to control analysis" and *Aceto* control analysis).

158. See Frank B. Cross and Blake J. Nelson, *Strategic Institutional Effects on Supreme Court Decisionmaking*, 95 NW. U. L. REV. 1437, 1455 (citing Civil Rights Act of 1991 as example of Congress overriding judicial interpretations of Civil Rights Act of 1964); see also Note, *Executive Discretion and the Congressional Defense of Statutes*, 92 YALE L.J. 970, 989 (1983) (explaining Congressional concern in maintaining legislation).

gress.¹⁵⁹ Should Congress deem the judicial interpretation to be flawed, CERCLA may be changed to clarify Congressional intent.¹⁶⁰

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159. See Nilsson, *supra* note 5, at 29 (explaining that Congressional intent focused on cleaning up polluted sites regardless of liability and penalty assessment).

160. See Cross and Nelson, *supra* note 158, at 1458 (describing that legislative overrides occur when judiciary "is ideologically outside the congressional policy preference.").